

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, by and through)
ARNOLD SCHWARZENEGGER,)
GOVERNOR OF THE STATE OF CALIFORNIA,)
and the CALIFORNIA AIR RESOURCES BOARD,)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, and)
STEPHEN L. JOHNSON, Administrator,)
)
Defendants.)
)

Case No. 1:07-CV-02024

**MOTION TO
INTERVENE AS
PARTY PLAINTIFFS**

The Commonwealth of Massachusetts and the States of New York, Arizona, Connecticut, Illinois, Maine, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the Commonwealth of Pennsylvania Department of Environmental Protection (“the Proposed Intervenors”) move to intervene as party-plaintiffs pursuant to Fed. R. Civ. Pro. 24(a) and (b). A proposed complaint is annexed to this motion as Exhibit A.

1. On October 24, 2007, the State of California (“California”), by and through Governor Arnold Schwarzenegger, and the California Air Resources Board (“CARB”), filed a complaint in this Court seeking to compel the United States Environmental Protection Agency (“EPA”), and its Administrator, Stephen L. Johnson, to decide California’s petition for a waiver of federal preemption, as provided for in Section 209(b) of the Clean Air Act (“CAA”), 42 U.S.C. § 7543(b), with respect to California’s Regulation to Control Greenhouse Gas Emissions from Motor Vehicles (Cal. Code Regs. tit. 13, §§ 1900, 1961, 1961.1 (2007); CARB Exec. Order

No. G-05-061, Cal. Reg. Notice Register 2005, No. 39-Z, at 1427-28 (2005)). This regulation requires reductions in fleet-average, greenhouse-gas emissions for most new motor vehicles sold in California, beginning with the 2009 model-year.

2. California, acting through CARB, requested the waiver of preemption from EPA on December 21, 2005 (EPA Docket EPA-HQ-OAR-2006-0173), pursuant to CAA § 209(b), but as California's petition to this Court demonstrates, EPA has unreasonably delayed acting on the waiver request.

3. The Proposed Intervenors have strong interests in ensuring that EPA grants California's waiver petition without any further unnecessary delay, as each of them has promulgated or is contemplating promulgating California's motor vehicle greenhouse gas emissions standards, which cannot be enforced unless and until EPA grants California's waiver.

BACKGROUND

Statutory Background: the Clean Air Act

4. The CAA authorizes the EPA to regulate tailpipe emissions from new motor vehicles. CAA § 202, 42 U.S.C. § 7521. Although the CAA generally prohibits states from adopting their own emission standards for new motor vehicles, CAA § 209, 42 U.S.C. § 7543(a), CAA § 209(b) grants California the authority to set its own emission standards because of the state's long-standing, severe air pollution problems as well as its pioneering efforts in adopting "motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation." Motor and Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1110-1111 (D.C. Cir.1979). Under CAA § 209(b), California must request and be granted a waiver of preemption from EPA before it may

enforce its regulations.

In 1977, Congress added CAA § 177, 42 U.S.C. § 7507, which authorizes other states to adopt emission standards for new motor vehicles that are identical to those California standards for which a waiver has been granted by EPA.

California's Adoption of its Greenhouse Gas Emission Regulation and Request for a Waiver

5. Recognizing that motor vehicles are the second greatest source of greenhouse gas emissions, CARB in September 2004 approved regulations that limit the amount of greenhouse gases that light- and medium-duty passenger vehicles sold in California may emit. See, e.g., 2005 Cal. Regulatory Notice Reg. 1427 (Sept. 30, 2005) (noting 2004 amendments).

6. On December 21, 2005, pursuant to § 209, California requested a waiver of preemption for its greenhouse gas regulations from EPA.

Because Proposed Intervenors Have or Expect to Adopt California's Greenhouse Gas Regulation, the Proposed Intervenors Have a Substantial Interest in this Action

7. Pursuant to their authority under CAA § 177, 42 U.S.C. § 7507, many of the Proposed Intervenors have adopted or promulgated the greenhouse gas emissions regulation first adopted by California. See Conn. Agencies Regs. § 22a-174-36b; 06-096 Code of Maine Regs. Ch. 127; 310 Code of Mass. Regs. 7.40; N.J. Admin. Code 7:27-29; Title 6 of the N.Y. Code of Rules and Regs., Part 218-8; Ore. Admin. Regs. 340-257-0100; 25 Pa. Code § 126.411; R. I. Low Emission Vehicle Program, Air Pollution Control Reg. No. 37.; Vt. Air Pollution Control Regs. Subch. XI and App. F; Wash. Admin. Code Ch.173-423.

8. Proposed Intervenors Maryland and New Mexico are in the process of promulgating the GHG regulation, see 34 Md. Reg. 1609; 20.2.88 NMAC.

9. Pursuant to Executive Order 2006-13, plaintiff-intervenor Arizona is in the process of drafting rules adopting the California GHG regulation.

10. Proposed Intervenor Illinois is considering adoption of the GHG regulation first adopted by California.

11. Indeed, some of the Proposed Intervenors are required as a matter of state law to adopt California's emission standards. See, e.g., Conn. Gen. Stat. § 22a-174g; 06-096 Code of Maine Regs. Ch. 127; Md. Code Ann. Envir. § 2-1102 (2007); Mass. G. L. Ch. 111, § 142K; N.J. Stat. Ann. § 26:2C-8.15 et seq.; Ore. Admin. Regs. 340-257-0100; Rev. Code Wash. 70.120A.

12. However, before the motor vehicle greenhouse gas regulations of the Proposed Intervenors can be enforced, EPA must first decide – and grant – California's waiver application.

The Proposed Intervenors Also Have a Substantial Interest in This Action Because of the Effects of Global Warming on Their States

13. The Proposed Intervenors have adopted or promulgated, or are contemplating adopting or promulgating, the greenhouse gas emissions regulation first adopted by California, because, like California, they recognize that motor vehicles are one of the most significant sources of the greenhouse gases that cause global warming. Global warming, in turn, is already negatively impacting the public health, economies and environments of the Proposed Intervenors. The effects of global warming are very serious, and in the absence of any abatement in global warming, these effects will only worsen. A few examples follow.

14. Global warming accelerates sea level rise, which threatens coastal populations, vital infrastructure and property, and delicate ecosystems. See <http://yosemite.epa.gov/OAR/globalwarming.nsf/content/CoastalZones.html>. Many of the

Proposed Intervenors – Maine, Massachusetts, Connecticut, Rhode Island, New Jersey, New York, Maryland, Oregon, and Washington – have significant coastlines and densely populated coastal areas. States on the East Coast below Cape Cod are particularly vulnerable to problems such as loss of coastal wetlands, erosion of beaches, saltwater intrusion of drinking water, and decreased longevity of low-lying infrastructure because this part of the East Coast is low and sandy. See, e.g., See EPA, “Climate Change and Connecticut,” (Sept. 1997) (“CT Impacts”) at 3; “Climate Change and Maryland” (Sept. 1998) (“MD Impacts”) at 3; “Climate Change and Massachusetts” (Sept. 1997) (“MA Impacts”) at 3; “Climate Change and New Jersey” (Sept. 1997) (“NJ Impacts”) at 3; “Climate Change and New York” (Sept. 1997) (“NY Impacts”) at 3; “Climate Change and Rhode Island” (Sept. 1997) (“RI Impacts”) at 3.

One of the causes of sea level rise is ice melt, which is occurring far faster than scientists had previously thought. See Richard A. Kerr, “Is Battered Arctic Sea Ice Down For the Count?” *Science*, Oct. 5, 2007, at 33-34; Daniel Cressey, “Arctic Melt Opens Northwest Passage,” *Nature* 449, 267 - 267 (19 Sep 2007); Andrew C. Revkin, “Arctic Melt Unnerves the Experts,” *N.Y. Times*, Oct. 2, 2007 (“The pace of change has far exceeded what had been estimated by almost all simulations used to envision how the Arctic will respond to rising concentrations of greenhouse gases linked to global warming.”).

15. Of equal concern are two recent studies that strongly suggest a link between increased global warming and hurricanes. See P.J. Webster, et. al, “Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment,” *Science*, Sept. 16, 2005, Vol. 309. no. 5742, at 1844-1846 (showing that in the last 35 years the number of category 4 and 5 hurricanes has almost doubled); Kerry Emanuel, “Increasing Destructiveness of Tropical

Cyclones over the past 30 Years,” *Nature*, July 31, 2005 (finding a similar increase in intensity in storms in the Atlantic and western North Pacific). Because these weather events would be superimposed on a higher sea level, they would cause damage over a larger area.

16. Heat waves have become more prolonged and intense with global warming. See Center for Health and the Global Environment, Harvard Medical School, “Climate Change Futures: Health, Ecological and Economic Dimensions” (Nov. 2005) (“Climate Change Futures”) at 53. In the United States, heat waves are the most prominent cause of weather-related mortality, exceeding the mortality rates for all other weather events combined. See S. A. Changnon, et al., “Impacts and Responses to the 1995 Heat Wave: A Call to Action,” *Bull. Am. Meteorol. Soc.* 77:1497-1506 (1996). Many Mid-Atlantic and Midwestern states, with their irregular, intense heat waves, are particularly susceptible to heat-related deaths and illnesses. See CT Impacts at 3; “Climate Change and Illinois,” (Sept. 1997) (“IL Impacts”) at 3; MA Impacts at 3; MD Impacts at 2-3; NJ Impacts at 3; NY Impacts at 3; “Climate Change and Pennsylvania,” (Sept. 1997) (“PA Impacts”) at 3; RI Impacts at 3.

17. Rising temperatures also lead to increased air pollution levels, with their attendant increases in respiratory illness and death. See <http://yosemite.epa.gov/OAR/globalwarming.nsf/content/health.html>. The presence of ground-level ozone in concentrations above the national ambient air quality standard has significant adverse health affects in these non-attainment areas, including increased hospitalizations and mortality risk for people with asthma and other respiratory diseases. See EPAWebsite/Impactshealth.html. Many proposed intervenors have large areas of the state that are in non-attainment for national ambient air quality standards for ozone. See, e.g., MA Impacts

at 3; NY Impacts at 3; PA Impacts at 3. In other cases, the entire state, or virtually the entire state, is in non-attainment for ozone. See, e.g., CT Impacts at 3; MD Impacts at 3; NJ Impacts at 3; RI Impacts at 3.

18. Hotter, drier weather could increase the frequency and intensity of wildfires in Western and Pacific Northwestern states. See EPA, “Climate Change and Arizona,” (Sept. 1997) (“AZ Impacts”) at 4; “Climate Change and New Mexico” (Sept. 1997) (NM Impacts) at 4; EPA, “Oregon and Climate Change” (“OR Impacts”) at 4; “Washington and Climate Change” (“WA Impacts”) at 4.

19. Other effects include disrupted water supplies. For example, warmer temperatures have already resulted in decreased mountain snowfall, which negatively impacts states that depend on mountain snowpack for part of their water supply, such as states in the Pacific Northwest and New England. See, e.g., OR Impacts at 3; WA Impacts at 4; EPA, “Climate Change and Maine” (Sept. 1998) (“ME Impacts”) at 4; MA Impacts at 4; EPA, “Climate Change and Vermont” (“VT Impacts”) at 4.

20. Another effect is the alteration of forest character, including the loss of hardwood trees that give many Northeastern forests their brilliant fall colors and support tourism and the maple syrup industry. See CT Impacts at 4; MA Impacts at 4; ME Impacts at 4; VT Impacts at 4.

21. The undertaking of projects to prepare for harmful global warming effects -- for example, modifying infrastructure to withstand rising sea levels and increased severe weather -- are long-term projects that cannot practicably be deferred until a crisis is at hand.

22. For Proposed Intervenors, adopting California’s motor vehicle greenhouse gas regulations is part of a larger state strategy to abate greenhouse gas emissions. For example,

several Northeastern states have agreed to stabilize and reduce carbon dioxide emissions from power plants. See <http://www.rggi.org> (describing the Regional Greenhouse Gas Initiative). Similarly, other states, including Massachusetts, Oregon, and Washington, have adopted statutes and/or regulations regulating carbon dioxide from power plants. See 310 Code Mass. Regs. 7.29; ORS 469.503 and Or. Admin. Rules 345-024-0500 to 0720; Rev. Code of Wash. 70.94.892, 80.70; Wash. Admin. Code Ch. 173-407. In addition, 22 states, including several Proposed Intervenor, and the District of Columbia, have established Renewable Portfolio Standards, which require states to increase the percentage of energy that they obtain from low-carbon energy sources such as solar, tidal and wind power. See http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm.

ARGUMENT

A. The Proposed Intervenor Satisfy the Standard for Intervention As of Right Under Fed. R. Civ. Proc. 24(a).

_____ Federal Rule of Civil Procedure 24(a)(2) provides that:

Upon timely application, anyone shall be permitted to intervene in an action: when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. Proc. 24(a)(2). Rule 24(a) is construed liberally in favor of granting intervention. In Re Vitamins Antitrust Class Actions, 215 F.3d 26, 29 (D.C. Cir. 2000); Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. 2001); Fed. Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). The Proposed Intervenor easily meet all of these criteria.

1. The Proposed Intervenor’s Ability to Regulate Motor Vehicle Greenhouse Gas Emissions is Contingent Upon A Decision From EPA on California’s Waiver Petition

This Circuit has granted intervention as of right when the intervenor’s “ability to protect its claimed interest may be impaired or impeded by the District Court’s disposition of the action.” Williams and Humbert, Ltd. v. W & H Trade Marks, Ltd., 840 F.2d 72, 77 (D.C. Cir. 1988). See also International Mortgage & Invest. Corp. v. Von Clemm, 301 F.2d 857, 862 (2d Cir. 1962) (intervention granted under previous version of rule where decision in the matter “would seriously prejudice” claimed interest); Yniguez v. Arizona, 939 F.2d 727, 737 (9th Cir. 1991) (“the question . . . is whether the district court’s decision will result in practical impairment” of the interests of the applicants for intervention) (emphasis in original). The courts are especially sensitive to the needs of states to intervene in actions that implicate state laws and policy interests. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert “California interests in a competitive system”).

The Proposed Intervenor’s interest in this action will be more than “impaired” or “impeded” by EPA’s decision; their interest depends directly on EPA’s decision. The only way Proposed Intervenor’s motor vehicle greenhouse gas emission regulations can be enforced is if EPA decides and grants California’s petition for waiver of federal preemption pursuant to CAA § 209(b). As long as EPA refuses to act, the Proposed Intervenor’s efforts to control motor vehicle derived greenhouse gas emissions within their borders are completely stymied. See, e.g., Motor Vehicle Manufacturers Assoc. v. Jorling, 17 F.3d 521, 534 (2nd Cir. 1994) (New York can adopt, but not enforce, California emissions standards pending a waiver from EPA). Since this case

asks the Court to order EPA to act expeditiously on California's waiver petition, the Proposed Intervenor's interest is clear and compelling.

The application of effective greenhouse gas emission regulations would, at a minimum, begin the process of reducing and reversing global warming. It is not necessary that the Proposed Intervenor show that the regulations would solve the problem. Massachusetts v. EPA, 127 S.Ct. 1438, 1457, 1458-1459, 167 L.Ed.2d 248, 75 USLW 4149 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.")

2. California May Not Adequately Represent Proposed Intervenor's Interests

An applicant meets the inadequate representation requirement if he "shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972) (emphases added). See also Fund for Animals v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003) (burden is not onerous). Moreover, "[a] governmental party that enters a lawsuit solely to represent the interests of its citizens . . . differs from other parties, public or private, that assert their own interests, even when these interests coincide." United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968 at 992 n.21 (emphasis added). Any doubts in favor of intervention should be resolved in favor of intervention. See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

Because California has a unique status under the Clean Air Act, Proposed Intervenor's authority to enforce their emissions regulations is derived from California. California, however, may prosecute or settle this action in a manner that does not square with the interests of the Proposed Intervenor. This potential difference between the interests of the Proposed Intervenor

and California is not theoretical. Some of the Proposed Intervenors have previously found themselves opposed to California in other motor vehicle emissions regulation cases. See, e.g., Assoc. of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Env. Prot., 208 F.3d 1, 5, 7-8 (1st Cir. 2000) (although California repealed its "Zero Emissions Vehicle" (ZEV) program and entered into Memoranda of Understanding (MOA) with auto manufacturers, Massachusetts could not adopt the MOA because they were not considered "standards" under CAA §§ 209, 177).

3. Proposed Intervenors' Intervention Is Timely.

The timeliness of a party's intervention is to be determined by looking at all the circumstances of the case, "especially weighing the factors of time elapsed since inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001) (citing United States v. AT&T, 206 U.S.App. D.C. 317, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Given that Proposed Intervnors are moving promptly after California filed its complaint, there can be no question of prejudice to defendant.

B. Proposed Intervnors Should Be Granted Permissive Intervention.

Should the Court deny Proposed Intervenors' motion to intervene as of right, it should grant Proposed Intervenors' permissive intervention. This Court has the discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that its "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). In exercising such discretion, courts "shall consider whether the intervention will unduly delay or prejudice the rights of the original parties." Id.; see also Citizens for an Orderly

Energy Policy, 101 F.R.D. at 502 (possibility of undue delay or prejudice is the “principal consideration”).

As discussed above in the Statutory Background section and Section A1, the enforceability of the Proposed Intervnors’ motor vehicle greenhouse gas emissions regulation rises or falls with EPA’s decision on California’s waiver application. Moreover, given that California has just filed its complaint, there can be no question of prejudice to defendant.

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully requests that the Court grant this motion to intervene.

Dated: November 8, 2007
New York, New York

Respectfully submitted,

FOR THE STATE OF NEW YORK
ANDREW M. CUOMO
ATTORNEY GENERAL
Katherine Kennedy
Michael Myers
/s/ Yueh-ru Chu
Assistant Attorneys General
120 Broadway, 26th floor
New York, NY 10271
(212) 416-6588

FOR THE COMMONWEALTH OF
MASSACHUSETTS
MARTHA COAKLEY
ATTORNEY GENERAL
Frederick D. Augensterm
James R. Milkey
William L. Pardee
Assistant Attorneys General
Environmental Protection Division
1 Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200 x. 2427

FOR THE STATE OF ARIZONA
TERRY GODDARD
ATTORNEY GENERAL
Joseph Mikitish
Tamara Huddleston
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007
(602) 542-8553

FOR THE STATE OF CONNECTICUT
RICHARD BLUMENTHAL
ATTORNEY GENERAL
Kimberly Massicotte
Jose A. Suarez
55 Elm Street
P.O. Box 120
Hartford, CT 06106
Phone: (860) 808-5250

FOR THE STATE OF ILLINOIS
LISA MADIGAN
ATTORNEY GENERAL
Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-3369

FOR THE STATE OF MAINE
G. STEVEN ROWE
ATTORNEY GENERAL
Gerald D. Reid
Assistant Attorney General
Chief, Natural Resources Division
Department of the Attorney General
6 State House Station
Augusta, Maine 04333
(207) 626-8545

FOR THE STATE OF MARYLAND
DOUGLAS F. GANSLER
ATTORNEY GENERAL
Kathy M. Kinsey
Assistant Attorney General
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230
410-537-3954

FOR THE STATE OF NEW JERSEY
ANNE MILGRAM
ATTORNEY GENERAL
Lisa Morelli
Assistant Attorney General
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625
(609) 633-8713

FOR THE STATE OF NEW MEXICO
GARY K. KING
ATTORNEY GENERAL
Stephen R. Farris
Judith Ann Moore
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6939

FOR THE STATE OF OREGON
HARDY MYERS
ATTORNEY GENERAL
Philip Schradle
Special Counsel to the Attorney General
Richard Whitman
Assistant Attorney General
1162 Court St. N.E.
Salem, Oregon 97301
(503) 378-6002

FOR THE COMMONWEALTH
OF PENNSYLVANIA, DEPARTMENT
OF ENVIRONMENTAL PROTECTION
SUSAN SHINKMAN, CHIEF COUNSEL
Richard P. Mather, Sr.
Deputy Chief Counsel
Kristen M. Campfield
Robert A. Reiley
Assistant Counsel
Rachel Carson State Office Bldg., 9th Flr.
P.O. Box 8464
Harrisburg, Pennsylvania 17105
(717) 787-7060

FOR THE STATE OF RHODE ISLAND
PATRICK C. LYNCH
ATTORNEY GENERAL
Patricia K. Jedele
Special Assistant Attorney General
Office of the Attorney General
150 South Main Street
Providence, Rhode Island
401-274-4400, ext. 2400

FOR THE STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL
Kevin O. Leske
Assistant Attorney General
109 State Street
Montpelier, VT 050609

FOR THE STATE OF WASHINGTON
ROB McKENNA
ATTORNEY GENERAL
Leslie Seffern
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504
(360) 586-6770